Bhojwani & Anor v Chung Khiaw Bank Ltd

COURT OF APPEAL (SINGAPORE) — CIVIL APPEAL NO 12 OF 1987
WEE CHONG JIN CJ, SINNATHURAY AND YONG PUNG HOW JJ
12 SEPTEMBER 1990

Civil Procedure — Summary judgment — Triable issue — Documentary credits — Rules of the Supreme Court 1970, O 14

Banking — Documentary credits — Strict compliance — Bills of lading not original — Insurance policy not in conformance with credit

On 8 January 1985 the appellants were indebted to the respondents in the sum of $1,040,777.48 in respect of banking facilities extended by the respondents to T Kishen & Co at the request of the appellants. On 9 July 1985 the respondents obtained summary judgment against the appellants for the sum of $1,040,777.48. The appellants' appeal to the judge-in-chambers was dismissed [see [1990] 2 MLJ 146] and they appealed to the Court of Appeal. The only issue raised by the appellants were on two letters of credit for $257,630.40 in respect of motor vehicles purchased by T Kishen & Co. The appellants alleged that (a) there had been no compliance with the terms of the letters of credit, (b) that the bills of lading were not originals, (c) that the insurance policy provided for cover from 'warehouse West Germany to warehouse Singapore' instead of 'shippers warehouse to buyers warehouse' as set out in the credit, and (d) that the certificate of shipment did not specify 'new' motor vehicles as specified in the letter of credit.

Held, dismissing the appeal:

(1) A fundamental principle under documentary credits is that the documents must conform strictly with the terms and conditions of the credit. In practice, however, this principle cannot be rigidly applied to all situations. Each case must be decided on its own merits. In the present case, the condition in the letter of credit could not be construed, as contended by the appellants, to require two certificates of shipment.

(2) Although strict compliance with the terms of credit is a fundamental principle, this is not all. An issuing bank must seek the instructions of its customer, the buyer, upon receipt of documents which it considers on their face not to be in strict compliance with the credit. Some discrepancies may be of little concern to the customer. If after consideration, the customer as the buyer accepts the discrepant documents, then the discrepancies are waived, and the position is just as if there had been no discrepancies in the first place.

(3) Although the certificate of shipment had not been issued by the ship owners as required by the credit, this discrepancy had been waived.

(4) The set of bills of lading appeared to have been properly signed by the hand of the carriers agent, and endorsed by the shippers and the respondents. There was, therefore, no merit in the second ground of appeal.

(5) The words 'warehouse West Germany to warehouse Singapore' in the marine insurance policy were more specific than the words 'shippers warehouse to buyers warehouse' and provided the necessary clarification and precision of the scope and terms of the insurance policy. This was a proper arrangement to conform with the true intention of the letter of credit.

(6) The invoices, in the present case, bore descriptions of the goods which corresponded exactly with the description in the letters of credit. This was all that was required to satisfy the requirement for compliance. On all other documents it was permissible for the goods to be described in general terms not inconsistent with the description in the letters of credit. Without the word 'new' the description in the certificate of shipment was more general and less specific than the description in the letters of credit, but was not inconsistent with it. This was in keeping with the provisions in art 32c of the Uniform Customs and Practice for Documentary Credits (1974 Revision).

Cases referred to

1 *Rafidain Bank* v *Agom Universal Sugar Trading Co Ltd* The Times 23 December 1986; [1987] 1 WLR 1606 (refd)
2 *Equitable Trust Co of New York* v *Dawson Partners* (1926) 27 L1 LR 49 (refd)
3 *Netherlands Trading Socy* v *Wayne & Haylitt Co, Chan Soon Fat & Ors* (1952) 36 HKLR 109 (folld)
4 *Sumitomo Bank* v *Co-operative Centrale Raiffeisen-Boereleen-Bank BA* [1987] 1 Lloyd's Rep 345 (folld)
5 *Bank Melli Iran* v *Barclays Bank (Dominion, Colonial & Overseas)* [1951] 2 Lloyd's Rep 367 (refd)
6 *Midland Bank* v *Seymour* [1955] 2 Lloyd's Rep 147 (folld)

Appeal from: Civil Suit No 536 of 1985 (High Court, Singapore)

YR Jumabhoy (*VKS Narayanan* with him) for the appellants.
Sarjit Singh Gill for the respondents.

Cur Adv Vult

Yong Pung How J (delivering the judgment of the court): The respondents are bankers carrying on business in Singapore and elsewhere. The appellants were at all material times carrying on business as partners under the name and style of T Kishen & Co in Singapore and were at all material times customers of the respondents.

On 8 January 1985 the appellants were indebted to the respondents in the sum of $1,040,777.48 in respect of banking facilities extended by the respondents to T Kishen & Co at the request of the appellants. These facilities comprised trust receipts, import bills and overdraft facilities, and interest would continue to accrue on the amounts owing on each of these facilities at agreed rates. After giving notice, the respondents issued a writ on 17 January 1985 claiming against the appellants the sum of $1,040,777.48 together with interest to be calculated on each facility from 9 January 1985 to the date of payment or judgment, and for costs on a solicitor and client basis.

On 9 July 1985 the respondents obtained summary judgment under O 14 in the sum claimed, together with costs. The appellants appealed to the judge-in-chambers to set aside the summary judgment, and on 15 January 1987 judgment was given dismissing the appellants' appeal. [See [1990] 2 MLJ 146.] The appellants thereafter appealed to the Court of Appeal praying that the learned judge's decision be reversed and that the appellants be granted leave to defend the action. Although the total sum

claimed by the respondents was $1,040,777.48 and judgment was entered for this sum, the only issue which appellants raised before the judge-in-chambers was in respect of the payments which had been made under two letters of credit which accounted for $257,630.40 of the total sum, and this was the amount which was involved in the appeal before us.

The appellants proceeded on four grounds of appeal:

(1) that there had been no strict compliance with the special terms of the letters of credit in each case;
(2) that the bills of lading were not originals but were copies and had not been properly signed;
(3) that the insurance policy provided for cover from 'warehouse West Germany to warehouse Singapore' instead of 'shipper's warehouse to buyer's warehouse' as indicated in the documentary credit;
(4) that the required certificate of shipment did not specify 'new' motor vehicles, whereas the documentary credit had specified that the shipment would be of new vehicles.

It was the appellants' contention that all these were discrepancies which raised triable issues and, instead of finding that they were '*really trivial in nature and were not sufficient to make the documents non-conforming*', the learned judge should have set aside the summary judgment and given the appellants unconditional leave to defend. In support of this, appellants' counsel referred to a statement by Lawton LJ in *Rafidain Bank* v *Agom Universal Sugar Trading Co Ltd & Anor*[1] that '*however improbable a story was, unless it was so improbable that it was beyond belief, it must be tried*'.

There were two letters of credit, and they were in identical terms. The material part of each letter of credit was in the following words:

> We hereby issue in your favour this documentary credit which is available by negotiation of your draft(s) at sight drawn on applicant bearing the issuing bank's name, number and date of this credit for full invoice value accompanied by the following documents (in duplicate unless otherwise specified) signed commercial invoice to indicate: (A) Chassis/Engine No (B) Colour & Upholstery (C) Optional Equipment & (D) Freight & Insurance Charges. Insurance policy blank endorsed for 120% CIF invoice value covering marine, war risks, and all risks including shippers' warehouse to buyer's warehouse with claims payable at Singapore
> full set 'clean on board' ocean bills of lading
> made out to the order of Chung Khiaw Bank Ltd
> notify applicant and marked freight prepaid evidencing shipment of
> 3 Units Mercedes Benz New Motor Cars Model 280SE @ £15,600-00/Unit
> 1 Unit Mercedes Benz New Motor Car Model 280 SEL @ £16,400-00
> Shipment from Hamburg to Singapore
> Latest shipment date 10 September 1984
> Partial shipments permitted
> Transhipment permitted

There were special conditions which were set out in the letter of credit which are material and included the following:

> On deck cargo not acceptable. Third party documents not acceptable. Beneficiary's signed certificate certifying that they have telexed buyer full shipment details including EDA of vessel in Singapore and name and address of Agent is required. B/Ls issued by Meridien Ltd acceptable provided accompanied by certificate issued by ships owner certifying the shipment of goods on board the same vessel. Drafts and documents must be presented to United Overseas Bank Ltd, London for negotiation/payment.
> Negotiating bank to telex us upon negotiation for £25,000 and above.
> Charges for telex advice of negotiation are for beneficiary's account.

On the first ground of appeal, that there had been no strict compliance with the special terms of the letter of credit, the appellants referred to one of the special terms:

> B/Ls issued by MERIDIEN LTD acceptable provided accompanied by certificate issued by ship owners certifying the shipment of goods on board the same vessel.

A fundamental principle under documentary credits is that the documents must conform strictly with the terms and conditions of the credit. If they conform, the seller is entitled to payment; if not, he is entitled to the return of his documents. The appellants contended therefore that, to begin with, there should have been two separate certificates of shipment, one for each letter of credit, instead of one certificate of shipment covering both credits. No authority was cited by the appellants in support of this contention, but the law on strict compliance with the terms of credit is well settled, and was explained by Lord Sumner in *Equitable Trust Co of New York* v *Dawson Partners*[2] at p 52:

> It is both common ground and common sense that in such a transaction the accepting bank can only claim indemnity if the conditions on which it is authorized to accept are in the matter of the accompanying documents strictly observed. There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines.

In practice, however, this principle cannot be rigidly applied to all situations. In the present case, respondents' counsel drew the court's attention to *Netherlands Trading Society* v *Wayne & Haylitt Co, Chan Soon Fat & Ors*,[3] a decision of the Supreme Court of Hong Kong. In that case, which concerned the sale of 750 bales of gunny bags, the defendants claimed that it was a condition precedent to the release of the credit that the bank's agents should receive a bill of lading covering the goods and one original weight certificate, and one original jute mills certificate relating to the goods. This condition was broken by the acceptance of the bill of lading, and of seven certificates, of which six did not purport to relate to the goods in question. In holding that the certificates were a sufficient

compliance with the terms of the credit, Gould J said at p 121:

> The defendants, in taking objection to the certificates, relied upon the decision in *Equitable Trust Co of New York* v *Dawson Partners Ltd* ((1926) 27 L1 L Rep 49). In that case, a certificate of quality by 'experts in the trade' had been asked for, but in decoding the cable, the word 'experts' had been rendered in the singular. A certificate signed by only one expert was held to be insufficient. That case, however, is very different from the present. In the circumstances there proved, the difference between one expert and more than one was clearly to be regarded as material. It is not so here. No one has suggested that the certificates do not contain everything that jute mills certificates and weight certificates ought to contain. The number of certificates cannot have been a material factor in the minds of the parties, particularly when it is remembered that the goods were to be shipped from Singapore and not from Calcutta. It is an obvious possibility that the 700 bales would be a reshipment of several different parcels. I hold, therefore, that, as far as their form and number is concerned, the certificates were a sufficient compliance with the letter of credit application.

There may well be instances in which on a true construction of the conditions in a credit the form and number of certificates to be provided are specifically set out, and must then be strictly complied with. Each case must be decided on its own merits, however, having regard to the words used in the letter of credit and the background circumstances in which the credit was established. In the present case, the condition in the letters of credit could not be construed to suggest the meaning claimed for it by the appellants.

The appellants also contended that the certificate of shipment provided was not 'issued by ships owner' as required, but was issued by one 'Eastern Shipping Agency' which also signed it 'for and on behalf of the owners'. Eastern Shipping Agency was clearly not the ships owner, and it could not be said that the 'owners' for and on whose behalf it signed the certificate were the 'ships owners' stipulated in the special condition in the letter of credit. In respect of this discrepancy, the respondents had in fact written a letter to T Kishen & Co on 23 August 1984 seeking their instructions in the following manner:

> Dear Sirs
>
> We advise having received from UOB London a cable as reproduced below:
>
> 'Documents presented value GBP63,200.00
> Your IC 02043736 our ILC 840841 with the following discrepancies:
> (1) Cert of shipment issued and signed on behalf of shipowners by Eastern Shipping Agency not shipowners
> Please telex advise may we pay as soon as possible?'
>
> Please let us have your instruction at your earliest convenience.
>
> Yours faithfully
> For Chung Khiaw Bank Ltd
>
> (Signed)
> Authorized signature

This letter carried an endorsement at the foot of it as follows:

> We accept above discrepancy
> T Kishen & Co
>
> (Signed)
> Managing partner

Appellants' counsel contended at the hearing before us that this apparent acceptance of the discrepant certificate could not constitute a waiver of the discrepancy, because at the time of acceptance the appellant had not signed the certificate itself. The respondents should have shown it to them, in which event the appellants would not have accepted the certificate and waived the discrepancy. No authority was cited by the appellants in support of this ingenuous contention, and we were unable to find any merit in it.

Although strict compliance with the terms of credit is a fundamental principle, this is not all. If the issuing bank, upon receipt of the documents, considers that they appear on their face not to be in strict conformity with the terms and conditions of the credit, it must seek the instructions of its customer, the buyer, as the principal in the transaction. It is for the customer to decide what to do, because the bank is not privy to his circumstances. Some discrepancies which may appear on their face to be of minor importance may be of crucial importance to him, and other discrepancies which may appear to be of major importance to a bank may be of little concern to its customer. See *Gutteridge and Megrah, The Law of Bankers' Commercial Credits* (7th Ed) at p 120. If, after consideration, the customer as the buyer accepts the discrepant documents, then the discrepancies are waived, and the position is just as if there had been no discrepancies in the first place: per Gatehouse J in *Sumitomo Bank* v *Cooperative Centrale Raiffeisen-Boereleen-Bank BA*[4] at p 353. In the present case, this particular discrepancy was drawn to the attention of the appellants by the respondents' letter of 23 August 1984 to T Kishen & Co of which they were active partners, and the discrepancy was accepted by the endorsement by T Kishen & Co at the foot of the letter. The endorsement was not dated, but in the circumstances nothing turned on this, and the acceptance constituted a valid waiver of the respondents' rights.

The appellants' second ground was that the bills of lading were not proper bills. At the hearing before this court, the appellants' counsel produced to the court the set of three bills which the appellants had recovered. He contended that the bills had merely been rubber-stamped as '1st original', '2nd original', and '3rd original' respectively, and were not original documents in the true sense, because, in his submission, they appeared to him to be copies which had been made by some mechanical means; similarly, the signature of the carrier's agent appeared to have been 'chopped' on the bills by means of a rubber stamp instead of having been hand-written. In this con-

nection, it is to be noted that the advances in printing technology have been recognized by the International Chamber of Commerce, and the scope of 'original' documents was widened by art 22(c) of the Uniform Customs and Practice for Documentary Credits (1983 Revision) to include copies made by reprographic systems. No evidence was offered to the court of any other rule, or any custom or practice, which might govern the manner in which bills of lading have to be signed, nor was any authority cited to us on this point. In any event, while it is true that the very high quality of reproductions by modern copying machines makes copies which are almost indistinguishable in their appearance from the originals, the set of three bills produced to the court in the present case appeared in fact to have been properly signed by the hand of some representative of Meridien Ltd as the carrier's agents, and even more clearly to have been endorsed by hand on the reverse side by Renkel Ltd as the shippers and by Chung Khiaw Bank Ltd as the issuing bank. In the circumstances, we could not see the merit, or indeed the relevance, of this second ground.

On the appellants' third ground, it was contended by them that the letters of credit expressly provided that one of the documents which would have to accompany drafts when they were negotiated against the credit was 'the insurance policy blank endorsed for 120% CIF invoice value covering marine, war risks, and all risks including shippers' warehouse to buyer's warehouse with claims payable at Singapore'. The marine insurance policy which was issued in this case, however, provided cover from 'warehouse West Germany to warehouse Singapore', and it was therefore contended by the appellants that the insurance policy was no longer in conformity with the requirements of the letter of credit. The respondents contended that the term 'shippers' warehouse to buyer's warehouse' used in the letter of credit was too ambiguous to be acceptable for insurance purposes, and was not therefore acceptable to insurance companies, since it would not be known where the shippers' warehouse was. The bill of lading itself showed that the goods were received in Stuttgart and the port of loading was Hamburg, both of which were places in West Germany. In the circumstances, the words 'warehouse West Germany to warehouse Singapore' were more specific than the words 'shippers' warehouse to buyer's warehouse' and provided the necessary clarification and precision of the scope and terms of the insurance policy. In our judgment, this was a proper arrangement to conform with the true intention of the letter of credit.

On the appellants' fourth ground, that the certificate of shipment did not specify 'new' motor vehicles, whereas the letters of credit had specified that the shipment would be of new vehicles, the appellants cited in support the decision in *Bank Melli Iran* v *Barclays Bank (Dominion, Colonial & Overseas)*.[5] In that case, which arose from the purchase by a Persian importer of 100 motor trucks, payment was authorized against the presentation of documents which included a US government undertaking confirming that the trucks were new. The invoices described the goods as 'in new condition', the delivery order as 'new good', and the government certificate as 'new, good'. In the face of these contradictions, the court held that all these phrases were not equivalent to, and as such were inconsistent with the description 'new', and that there was a discrepancy. In the present case, the invoices bore descriptions of the goods which corresponded exactly with the description in the letters of credit. In our view this was all that was necessary to satisfy the requirement for compliance. On all other documents it was permissible for the goods to be described in general terms not inconsistent with the description in the letters of credit. For consistency, the documents on the whole must relate to the same transaction and on their face bear a relation to another. Without the word 'new', the description in the certificate of shipment was more general and less specific than the description in the letters of credit, but was not inconsistent with it: *Midland Bank* v *Seymour*.[6] It is to be noted that art 32c of the Uniform Customs and Practiced for Documentary credits (1974 Revision) provided as follows:

> The description of the goods in the commercial invoice must correspond with the description in the credit. In all other documents the goods may be described in general terms not inconsistent with the description of the goods in the credit.

For all the above reasons, we dismissed the appeal, with costs on a solicitor and client basis.

Appeal dismissed.

Solicitors: *Swami & Narayanan; Shook Lin & Bok.*

Reported by *Mathavan Devadas*